INDEX

	Page
Statement of Facts	1
Argument	4
The District Court Did Not Abuse its Discretion in Enjoining, Pending Fair Reapportionment, the Proposal of An Entirely New State Constitution By A Grossly Malapportioned Legislature	4
II The District Court Correctly Held, As A Matter of State Law Within Its Pendant Jurisdiction, That The Georgia General Assembly Has No Authority To Propose To The Electorate An Entirely New State Constitution In The Form of An Amendment To The Present Constitution	11
Conclusion	15

CITATIONS

Cases:

Baker v. Carr	8
Carton v. Secretary of State, 151 Mich. 337, 115 N.W. 429, 430 (1908)	15
Central Kentucky Natural Gas Co. v. Railroad Commission, 290 U.S. 264, 271, 54 Sup.Ct. 154, 78 L.Ed. 307 (1933)	9
Ellingham v. Dye, 178 Ind. 336, 99 N.E. 1, 10 (1912)	15
Gray v. Sanders, 372 U.S. 368, 83 Sup.Ct. 801, 9 L.Ed. 2d 821 (1963)	2

CITATIONS (Continued)

	Page
Livermore v. Waite, 102 Cal. 113, 36 Pac. 424, 426 (1894)	14
Lucas v. Forty-Fourth General Assembly of Colorado, 377 U.S. 713, 736, 84 S.Ct. 1472, 12 L.Ed. 2d 632 (1964)	10
McFadden v. Jordan, 32 Cal. 2d 330, 196P. 2d 787, 796-97 (1948)	9, 15
McNeese v. Board of Education, 373 U.S. 688, 83 Sup.Ct. 1433, 10 L.Ed. 2d 622 (1963)	13
Reynolds v. Sims, 377 U.S. 533, 84 Sup.Ct. 1362 12 L.Ed. 2d 506 (1964)	2, 4, 7
Seago v. Richmond County, 218 Ga. 151, 154, 126 S.E. 2d 657 (1962)	12
Skelton v. Tucker, 364 U.S. 479, 488, 81 Sup.Ct. 247, 5 L.Ed. 2d 231 (1960)	11
Toombs v. Fortson, 205 F.Supp. 248 (N.D. Ga. 1962) (R. 65)	1, 2
Wheeler v. Board of Trustees of Fargo Consolidated School District, 200 Ga. 323, 329-30, 37 S.E. 2d 322 (1946)	12, 13
Constitution:	
Georgia Constitution, 1945, Article XIII, Section I Paragraph 1, Ga. Code Sec. 2-8101)	11, 12

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 300

BEN W. FORTSON, JR., ET AL., APPELLANTS,

vs.

HENRY J. TOOMBS, ET AL., APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF FOR THE APPELLEES

STATEMENT OF FACTS

This action was brought in 1962 seeking reapportionment of both houses of the Georgia legislature in conformity with the requirements of the Fourteenth Amendment (R. 15). The district court found the disparities existing in both houses to be so extreme as to amount to invidious discrimination against appellees. It ordered the prompt reapportionment of one house and held that it was not necessary at that time to make a final determination whether the other house could remain completely unrelated to population ratios. *Toombs v. Fortson*, 205 F.Supp. 248 (N.D. Ga. 1962) (R. 65). The court retained jurisdiction for the entry of such further orders as might be required. In compliance with the order, the Georgia Senate was reapportioned in October, 1962.

On June 17, 1964, following the decision of this Court in *Reynolds* v. *Sims*, 377 U.S. 533, 84 Sup.Ct. 1362, 12 L.Ed. 2d 506 (1964) and its companion cases, appellees moved in the district court to compel reapportionment of the House of Representatives of the Georgia General Assembly prior to the November 1964 general election. (R. 98). Under the 3-2-1 system of apportionment of the Georgia House, 22% of the people residing in 103 rural counties control an absolute majority of the 205 House seats. A voter in Echols County has 100 times the effective representation in the House of Representatives than those who reside in Fulton County. Fulton County, with over 14% of the State's total population, is represented by only 3 of the 205 House seats. The glaring disparities in the apportionment of the House of Representatives are more fully stated in the district court's initial opinion in *Toombs* v. *Fortson*, 205 F.Supp. 248, 251 (N.D. Ga. 1962) (R. 65) and are identical with the disparities existing under the Georgia county-unit system which was struck down by this Court in *Gray* v. *Sanders*, 372 U.S. 368, 83 Sup.Ct. 801, 9 L.Ed. 2d 821 (1963).

At the hearing in the district court, appellants made no attempt to defend the constitutionality of the system under which the House of Representatives has been apportioned for more than 96 years. Appellants asked only that reapportionment be delayed two more years until January 1967.

At the time of the hearing in the district court the Georgia General Assembly was then convened in an extraordinary session to prepare a new constitution for submission to the people for ratification at the November 1964 general election in the form of a "package

amendment" to the existing constitution. In order to be placed on the ballot as an "amendment", the proposed constitution had to secure a two-thirds affirmative vote in the severely malapportioned House of Representatives. Consideration by the fairly apportioned Senate of each of the myriad proposals contained in the revised constitution had to take this dominant political factor into account.

Following hearings on June 19 and 24, the district court on June 30, 1964 entered an order permitting reapportionment to be deferred until after the November 3, 1964 general election. (R. 200-201). However, during the interim it enjoined the appellants, state election officials, from placing the question whether any entirely new constitution should be adopted in the form of an amendment to the present constitution on the ballot in any election pending reapportionment of the General Assembly. (R. 200-201). The injunction did not prevent the submission to the electorate of individual constitutional amendments, separated as to subject matter, nor did it prohibit the calling of a constitutional convention of delegates elected by the people on the basis of population, as provided by the Georgia constitution. (R. 200-201). On July 6, 1964, the appellants' application for a stay pending appeal was denied by Mr. Justice Black.

On October 7, 1964, the appellants again moved in the district court for a modification of its order of June 30, to permit reapportionment to be delayed for two more years, or, in the alternative, for the elimination of certain language from the order which they interpreted as unduly restricting the powers of the General Assembly. The district court on November 3, 1964 denied the requested delay of reapportionment, but granted

the alternative request and eliminated the restrictive language as requested by the appellants. For the convenience of the Court, the appellants' motion together with the appellees' response thereto and the order of November 3, 1964, which are not included in the printed record, have been printed in full in the appendix to the Motion to Dismiss of the appellees.

ARGUMENT

The District Court Did Not Abuse its Discretion in Enjoining, Pending Fair Reapportionment, the Proposal of An Entirely New State Constitution By A Grossly Malapportioned Legislature.

After the decision of this Court in *Reynolds* v. *Sims*, 377 U.S. 533, 84 Sup.Ct. 1362, 12 L.Ed. 2d 506 (1964), it can no longer be disputed that the egregious disparities in representation in the House of Representatives of the Georgia General Assembly of more than 100 to 1, which exist under the arbitrary 3-2-1 system of apportionment, are unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.

Under the *Reynolds* decision, an order requiring immediate reapportionment of the General Assembly prior to the November 3, 1964 general election would clearly have been appropriate. As this Court there emphasized; "Once a state's legislative apportionment scheme has been found to be unconstitutional it would be the *unusual* case in which a court would be justified in not taking appropriate action to insure that *no further elections are conducted under the invalid plan.*" *Reynolds* v. *Sims*, 377 U.S. 533, 585, 84 Sup.Ct. 1362,

12 L.Ed. 2d 506 (1964) (Emphasis supplied). Although this Court recognized that relief might be withheld "Where an impending election is imminent and a state's election machinery is already in progress," it expressly held that the district court acted with proper judicial restraint when it ordered immediate reapportionment of the Alabama legislature on July 21, 1962 (a month later than in the present case), "at a time sufficiently early to permit the holding of elections pursuant to that plan without great difficulty," notwithstanding the fact that all candidates for election to the Alabama legislature had already been nominated in party primaries which had been held in May. 377 U.S. at 586.

At the time of the hearings in the district court on June 19 and 24, only 52 Democratic candidates and no Republican candidates had been nominated to the 205 member Georgia House of Representatives. Although the General Assembly was then convened in extraordinary session, and ample time remained during which reapportionment might have been accomplished,[1] the district court, in deference to the appellants' requests for delay, refused to require that the House be reapportioned prior to the November 3, 1964 general election. Guided by general equitable principles, the court sought "an accommodation between the relief which would permit the Legislature to reapportion itself, and yet would leave to such reapportioned Legislature the performance of its legislative duty . . . ." (R. 169). Accord-

---

[1] Previously in *Toombs* v. *Fortson*, 205 F. Supp. 248 (N.D. Ga. 1962), the district court in September 1962, required immediate reapportionment of the Georgia Senate prior to the November 1962 general elections. Despite the comparative shortness of time remaining before the general election, reapportionment was accomplished promptly and without difficulty.

ingly, the court concluded "that adequate protection of the rights of plaintiffs and their class can be afforded without . . . interfering with the normal election procedures in this election year." (R. 167) The terms of service of the members of the General Assembly elected at the November 3, 1964 general election were limited to one year, during which the Assembly has the opportunity to enact a fair reapportionment and the necessary enabling legislation in order that members of the newly-constituted General Assembly may take office in January 1966. (R. 200-201, and see the order of November 3, 1964). No appeal has been taken by the appellants from this portion of the order of June 30, 1964.[2]

However, the district court recognized that the malapportioned General Assembly was then convened in

---

[2] Since no appeal was taken from that portion of the order of June 30, 1964, which restricted the terms of all legislators elected in the November 3, 1964 general election, no question as to the validity of this limitation is presented for determination by this Court. Since, under *Reynolds* v. *Sims*, 377 U.S. 533, 84 Sup.Ct. 1362, 12 L.Ed.2d 506 (1964), the district court was authorized "to insure that no further elections are conducted under the invalid plan," the power of the district court, in the exercise of its equitable discretion, to adopt a less drastic remedy, by reducing the length of the terms which legislators would be permitted to serve prior to reapportionment cannot be seriously questioned. Similar limitations upon the length of legislative terms have been imposed by other courts as an appropriate exercise of equitable powers to insure prompt reapportionment. See order of September 28, 1964 in *Davis* v. *Mann*, in which the four-year terms for which members of the Virginia Senate were elected in November 1963 were ordered terminated in January of 1966, a year earlier than their normal expiration date. A stay of the order was denied by the Chief Justice on October 28, 1964; order of July 27, 1964 in *W.M.C.A. Inc.* v. *Lomenzo*, in which the terms of members of the New York Legislature were limited to one year. An appeal from this decision is now pending before this Court. (Nos. 611, 623).

extraordinary session for the limited purpose of enacting a comprehensive new election code and proposing an entirely new state constitution which "will be a basic law of the State until and unless amended in the future . . . by a two-thirds vote of the two houses of a properly apportioned General Assembly." (R. 167). The court held that to permit the grossly malapportioned General Assembly to fundamentally alter the charter of state government by proposing to the electorate an entirely new state constitution would be inconsistent with this Court's mandate in *Reynolds* v. *Sims*. (R. 167). Accordingly, the appellants were enjoined from "placing on the ballot to be used in the General Election to be held on November 3, 1964, or at any subsequent election until the General Assembly is reapportioned in accordance with constitutional standards, the question whether a constitutional amendment purporting to amend the present state constitution by substituting an entirely new constitution therefor shall be adopted." (R. 200-201).

The issuance of this injunction was clearly necessary to prevent irreparable injury to the plaintiffs and their class until reapportionment of the House of Representatives is accomplished. Indeed, similar relief was granted in the *Reynolds* case, in which, as this Court observed, the district court prevented the proposed 67-senator amendment from being placed on the ballot for ratification at the general election by invalidating it prospectively. See *Reynolds* v. *Sims*, 377 U.S. at 570, footnote 48.

As this Court emphasized in *Reynolds* v. *Sims*:

"Remedial technique in this new and devel-

> oping area of the law will probably often differ with the circumstances of the challenged apportionment and a variety of local conditions." 377 U.S. at 585.

To guide the district courts in moulding their decrees this Court quoted from the concurring opinion of Mr. Justice Douglas in *Baker* v. *Carr* that "any relief accorded can be fashioned in the light of well-known principles of equity."

This Court's directions to the district courts in *Reynolds* v. *Sims* are remarkably similar to those in the school desegregation cases. There, the Court said:

> "Full implementation of these constitutional principles may require solution of varied local school problems . . . In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power." *Brown* v. *Board of Education*, 349 U.S. at 294, 299-300, 75 Sup.Ct. 753, 99 L.Ed. 1083 (1955).

In the present case the district court, having rejected the prayer of the appellees for immediate relief, followed the mandate of this Court to act and rely on general equitable principles and provided an "accommodation" to safeguard the interests of appellees and their class during the continued suspension of their constitu-

tional rights while the decree is being carried out. In so doing the Court applied the undoubted power of a court of equity to "prescribe the performance of conditions designed to protect the rights of the parties pending appeal . . . or to protect temporarily the public interest while its decree is being carried into effect." *Central Kentucky Natural Gas Co.* v. *Railroad Commission*, 290 U.S. 264, 271, 54 Sup.Ct. 154, 78 L.Ed. 307 (1933).

It cannot be seriously disputed that by far the most important stage in the adoption of a new constitution is that of drafting the basic principles to be included within its provisions. After adoption of a constitution by the legislature, the people can only accept or reject it in its entirety—they are without power to rewrite the document submitted to them, no matter how odious individual provisions may be. As the Supreme Court of California emphasized in *McFadden* v. *Jordan*, 32 Cal. 2d 330, 196 P. 2d 787, 796-97 (1948):

> "The proposal is offered as a single amendment but it obviously is multifarious. It does not give the people an opportunity to express approval or disapproval severally as to each major change suggested; rather does it, apparently, have the purpose of aggregating for the measure the favorable votes from electors of many suasions who, wanting strongly enough any one or more propositions offered, might grasp at that which they want, tacitly accepting the remainder. Minorities favoring each proposition severally might, thus aggregated, adopt all. Such an appeal might well be proper in voting on a revised constitution, proposed under the safeguards provided for such a pro-

cedure, but it goes beyond the legitimate scope of a single amendatory article."

To be unfairly excluded from this initial stage in the formulation of a new constitution is to be cut off from the very well-springs of government. At this point in the political process, more than at any other, to the extent that an individual is inadequately represented "he is that much less a citizen." See *Reynolds* v. *Sims*, 377 U.S. at 567.

It is no answer that the constitution which has been proposed by a malapportioned General Assembly will be submitted in its entirety for ratification by the people at the general election. As this Court emphasized in *Lucas* v. *Forty-Fourth General Assembly of Colorado*, 377 U.S. 713, 736, 84 S. Ct. 1472, 12 L.Ed. 2d 632 (1964). "an individual's constitutionally protected right [to full and effective participation in the political processes of the State's legislative bodies and] to cast an equally weighted vote can not be denied even by a vote of a majority of a State's electorate. . . ." As the district court observed in the present case, a constitutional provision adopted by an invalidly apportioned legislature, unlike an ordinary statute, cannot be changed after reapportionment by a simple majority. The fact that the proposed constitution can be amended only by a two-thirds vote of both Houses effectively locks the provisions into the document.

Appellants have chosen to ignore in their argument the fact that the district court was careful to leave open the power to propose and adopt constitutional amendments or even an entirely new constitution by means less likely to result in irreparable injury to the right

of the plaintiffs to participate in the political processes of republican government. The appellants were expressly authorized to place individual amendments on the ballot, separated as to subject matter as required by the Georgia Constitution (Ga. Const. 1945, Article XIII, Section I, Paragraph I, Ga. Code Sec. 2-8101), for acceptance or rejection by the people on an individual basis. The order further stated that it should not prevent the General Assembly from calling a "convention of the people to revise, amend or change the constitution" in which convention, representation is "based on population as nearly as practicable" in accord with Article XIII, Section I, Paragraph II, of the Georgia Constitution of 1945. (Ga. Code Sec. 2-8102). The state has full power to amend the present constitution in any respect which it may deem necessary or appropriate. The only restriction imposed by the order of the district court is to require that it do so in a manner which is not unduly destructive of the rights of the class represented by appellees during the interim period prior to the time that they are fully and adequately represented in both houses of the General Assembly. cf. *Shelton* v. *Tucker*, 364 U.S. 479, 488, 81 Sup.Ct. 247, 5 L.Ed. 2d 231 (1960).

II. **The District Court Correctly Held, As A Matter of State Law Within Its Pendant Jurisdiction, That The Georgia General Assembly Has No Authority To Propose To The Electorate An Entirely New State Constitution In The Form of An Amendment To The Present Constitution.**

Ancillarly to its determination of the federal questions (cf. *Hurn* v. *Oursler*, 289 U.S. 238, 53 Sup.Ct. 586, 77 L.Ed. 1148 (1933)), the district court held that the

General Assembly had no authority to propose an entirely new state constitution[3] as a single "amendment" for ratification by the electorate. Under the Georgia Constitution of 1945, the General Assembly is authorized to propose individual amendments to the state constitution which must be submitted to the electorate in such manner "as to enable the electors to vote on each amendment separately." Ga. Const. of 1945, Art. XIII, Section I, Paragraph I, Ga. Code Ann. §2-8101. The General Assembly has no power to propose a new or revised constitution, (*Wheeler* v. *Board of Trustees of Fargo Consolidated School District*, 200 Ga. 323, 37 S.E. 2d 322 (1946)), which must be proposed by constitutional convention in which "representation . . . shall be based on population as near as practicable." Ga. Const. of 1945, Art. XIII, Section I, Paragraph II, Ga. Code Ann. §2-8102. As the Supreme Court of Georgia has emphasized, " 'The procedure and requirements established for the amendment of the fundamental law are mandatory and must be strictly followed, in order to effect a valid amendment.' " *Seago* v. *Richmond County*, 218 Ga. 151, 154, 126 S.E. 2d 657 (1962).

In reliance upon these decisions, and upon the decision of the Supreme Court of Georgia in *Wheeler* v. *Board of Trustees of Fargo Consolidated School District*, 200 Ga. 323, 329-30, 37 S.E. 2d 322 (1946), the district court held the General Assembly to be without authority to propose an entirely new constitution, under the guise of an amendment and, accordingly, enjoined its submission for ratification at the November 3, 1964 general election. Since the case was one arising under the Civil

[3] The proposed revised constitution is contained in Ga. Laws 1964, May-June Extraordinary Session 234.

Rights Act, the district court did not abuse its discretion in refusing to abstain. *McNeese* v. *Board of Education*, 373 U.S. 668, 83 Sup.Ct. 1433, 10 L.Ed. 2d 622 (1963).

The decision of the district court, holding the proposed "amendment" to be invalid, is fully consistent with that of the Georgia Supreme Court in *Wheeler* v. *Board of Trustees of Fargo Consolidated School District*, 200 Ga. 323, 37 S.E. 2d 322 (1946). In 1945, the General Assembly proposed as "one single amendment," a complete revision of the Constitution of 1877, which was subsequently ratified by the electorate. Following its ratification, suit was brought to invalidate the revision as having been improperly adopted. Proponents of the 1945 revision sought to sustain its validity as an amendment to the Constitution of 1877. Holding the 1945 revision not to be a valid amendment to the Constitution of 1877, the Supreme Court of Georgia said:

> "We conclude that the instrument . . . is not an amendment to the constitution of 1877; but on the contrary it is a completely revised or new constitution." 200 Ga. at 330, 37 S.E. 2d at 327.

The Court noted that in drafting the proposed constitution, the Georgia legislature, like the Federal Convention which drafted the Constitution of the United States, was no more than " 'a mere assemblage of private citizens, and their work had no more binding sanction than a constitution drafted by Mr. Hamilton, in his office, would have had.' " 200 Ga. at 332, 37 S.E. 2d at 328 (1946). However, the Court refused to hold the constitutional convention to be the exclusive method of adoption of a new constitution. Notwithstanding the

irregular origin of the 1945 revision, the Court held it to have been validated as the result of its ratification by the people. Thus, the Court said:

> "When the people adopt a completely revised or new constitution, the framing or submission of the instrument is not what gives it binding force and effect. The fiat of the people, and only the fiat of the people, can breathe life into a constitution." 200 Ga. at 333, 37 S.E. 2d at 328-29 (1946).

Thus, it is clear that the portions of the *Wheeler* case, relied on by the appellants, stand only for the proposition that after a constitutional revision has been ratified by the people at a valid election, it may not, thereafter, be attacked on grounds that it was proposed in an irregular or unauthorized manner. It is equally clear, however, that the *Wheeler* decision does not purport to authorize circumvention by the General Assembly of the clear provisions of the state constitution by attempts to disguise broad constitutional revisions under the subterfuge of a single amendment which must be accepted or rejected by the electorate as a package. Indeed, the spirit, if not the letter of the *Wheeler* decision, is precisely to the contrary.

The courts of other states have reached similar conclusions. For example, in *Livermore* v. *Waite*, 102 Cal. 113, 36 Pac. 424, 426 (1894), a suit was brought to enjoin the Secretary of State of California from submitting to the electorate a proposed constitutional "amendment" which was in fact a complete revision of the constitution. There, the court in affirming the injunction issued by the lower court said:

> "The Legislature is not authorized to assume the function of a constitutional convention, and propose for adoption by the people a revision of the entire constitution under the form of an amendment, . . ."

In *McFadden* v. *Jordan*, 32 Cal. 2d 330, 196 Pac. 2d 787 (1948), in which the legislature of California proposed an "amendment" to the California Constitution, suit was brought to prohibit the proposed change from being placed on the ballot. The court granted the injunction, holding that the proposed change was a "revision" rather than an "amendment" and hence could not be proposed or initiated by the legislature. See also *Carton* v. *Secretary of State*, 151 Mich. 337, 115 N. W. 429, 430 (1908), and *Ellingham* v. *Dye*, 178 Ind. 336, 99 N. E. 1, 10 (1912).

It is clear, therefore, that the district court correctly enjoined the submission as a single amendment of the proposed revised state constitution in violation of the provisions of the Georgia constitution.

CONCLUSION

In preventing the proposal of an entirely new state constitution by the grossly malapportioned General Assembly, pending reapportionment, the district court reached a practical "accommodation" which permits the continued adoption of constitutional amendments on specific matters of importance to the state and, yet, affords to the appellees some measure of protection during the interim while fair reapportionment is delayed. It is manifest that the remedy framed by the district court is a sound adaptation of general equitable prin-

ciples to local conditions, and fulfills not only the spirit, but the letter of the decision of this Court in *Reynolds* v. *Sims*. The appellees respectfully pray, therefore, that the decisions below be affirmed.

Francis Shackelford
Attorney for Appellees

Edward S. White
Israel Katz
Hamilton Lokey
Joseph B. Cumming
William B. Gunter
A. R. Kenyon

Emmet J. Bondurant, II
J. Quentin Davidson
John E. Simpson
Raymond M. Reed
John W. Sognier
Albert P. Reichert

1220 Citizens &
Southern National
Bank Building
Atlanta, Ga. 30303

PROOF OF SERVICE

I, Emmet J. Bondurant, II, attorney for appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of November, 1964, I served copies of the foregoing Brief on the appellants herein named, by mailing copies in a duly addressed envelope, with postage prepaid, to Eugene Cook, Attorney General, State of Georgia, State Law Building, Atlanta, Georgia, attorney of record for said appellants.

Emmet J. Bondurant, II